



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**  
**CIVIL CASE NO.152 OF 2017**

**STYLE INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**SANVOKS INDUSTRIES LIMITED.....DEFENDANT**

**RULING**

This is a ruling on application dated 25<sup>th</sup> April 2017 filed by the defendant herein seeking the following prayers

1. Spent
2. Spent
3. That injunctive orders issued on 19<sup>th</sup> April 2017 be discharged/vacated and the defendant be granted leave to defend the application dated 6<sup>th</sup> April 2017.
4. That costs of the application be in the cause

Grounds on the face of the application are that the application dated 6<sup>th</sup> April 2017 was never served upon the defendant's authorized agent; that none of the directors was in the office at the time the application is alleged to have been served. That failure to file response to the application was not deliberate. Further that the defendant has strong defence and the injunctive orders issued are highly prejudicial to the applicant.

The application is supported by affidavit sworn by a director of the defendant Baariu Tom Francis on 25<sup>th</sup> April 2017. He averred that the defendant is a manufacturer, distributor and wholesaler dealing with hair pieces, weaves, wigs and hair extensions in Kenya; and that it is the registered owner of trademarks registered as VOKS, MARIA, MALLI and BRILLIANT. He annexed copies of approvals. He deponed that the application dated 6<sup>th</sup> April 2017 was never served upon any of the defendant's authorized agent. He averred that none of the directors was present at the time the application is alleged to have been served and that the person who received the documents never informed any of the 3 directors. He said they came to know existence of the application on 21<sup>st</sup> April 2017 when one of the directors reported to the office. On perusal of the court file through their lawyer they learnt that the application dated 6<sup>th</sup> April had been allowed in its entirety. He stated that failure by the defendant to file response to the application was not intentional but was beyond its control. He averred that injunctive orders were granted to the effect that the defendant allow plaintiff access to their premises and take inventory of the defendant's products going by the name "BRILLIANT EXPRESSION BRAIDS" and take away necessary samples and keep the rest

which will highly prejudice the defendant.

He averred that the defendant has a strong defence. He averred that at the time of filing this suit the plaintiff's application for registration of the alleged assignment was pending and the claim for infringement could not be made before the mark was registered by the plaintiff. He averred that the defendant's products are different from the ones being claimed by the plaintiff. He stated that the defendant's product is known as BRILLIANT or VOKS and not EXPRESSIONS as the plaintiff would want the court to believe; and the registered trade mark by the plaintiff is "EXPRESSIONS" and not "EXPRESSION" as admitted by the plaintiff. He stated that the plaintiff lacks the necessary locus standi to institute this suit having not complied with Trade mark Act as regard to assignments. He urged court to give the defendant an opportunity to be heard. He stated that if orders granted on 19<sup>th</sup> April 2017 are not set aside, will be forced to close their factory and leave many employees unemployed. He annexed draft response to the application.

Counsel for the applicant filed written submissions dated 13<sup>th</sup> June 2017. Applicant re stated the grounds in support of the application. On failure to comply with order 4 rule 1(4), the applicant cited *Solpia Kenya Limited vs Style Industries Limited & Another* (2015) eKLR where the court referred to *Elite Earthmovers Limited vs Krishna Bela & sons* civil no.474 of 2002 (unreported) and *Access Business management conferencing international LTD vs Diana Mbinya muasya & Another* (2016) eKLR where the court held that an a verifying affidavit of a plaint or affidavit in support of an application will be struck out on ground of being defective and incompetent.

On whether injunctive orders should be set aside the defendant/applicant submitted that the defendant stand to suffer irreparable damage if not set aside on the ground that the plaintiff does not have a registered trademark going by the word EXPRESSION; That the defendant has not infringed on the plaintiff's trademark as the name and packaging and model of its products are distinct and different from that of the plaintiff.

In response the Plaintiff written dated 12<sup>th</sup> July 2017. counsel for the respondent submitted that the defendant was served by process server one Bashir mumbaha who confirmed that he served one of its directors VIJAY CHAWDA. Plaintiff submitted that under order 5 Rule 3 of the civil procedure rules provide that service may be done on the secretary, director or other principle officer of the corporation or left at the registered office of the corporation. He submitted that in this case documents were served on the director and if he is not the director that is cured by leaving the documents in the corporation's premises. He submitted that the defendant was careless and setting aside the orders on ground that the directors were not in the office from 12<sup>th</sup> April 2017 to 21<sup>st</sup> April 2017 would encourage carelessness. He submitted that it will not serve any purpose to rehear the plaintiff's application. Plaintiff submitted that the defendant's use of plaintiffs trade mark is clear infringement of the plaintiff's statutory protection. Plaintiff submitted that the court must be satisfied that the defendant has an argument when considering whether the application dated 6<sup>th</sup> April 2017 should be heard afresh. Plaintiff submitted that the defendant does not have a valid argument; that the use of trade name Expression on the same goods for which the plaintiff uses this same trade mark is not infringement. Plaintiff submitted that it would make sense to reopen the application to affirm infringement.

On the ground that the plaintiff's suit is fatally defective for failing to comply with order 4 Rule 4 and order 9 Rule 2(c) of the civil procedure Rules plaintiff submitted that it is not relevant at this stage and that it may have been relevant if the defendant was seeking to strike out the suit or application. Plaintiff submitted while in several decisions the holding is that authority must be given, the authority need not be filed with the proceedings. Plaintiff submitted that the defendant quoted the case of *Solpia Kenya Limited vs Style Industries Limited and Another* (2015) eKLR out of context. He submitted that judge Gikonyo made this point:-

***"The omission does not make the affidavit fatally defective and does not go to the jurisdiction. in any case, the applicant averred that it is ready and willing to file the authority as soon as possible and before the hearing of the matter herein."***

Plaintiff's counsel submitted that the authority has already in the matter herein. Plaintiff prayed for dismissal of this application.

I have considered rival submissions by Advocates herein. I have also perused the annexures attached to affidavits filed. The applicant seek leave to defendant application dated 6<sup>th</sup> April 2017 on ground of lack of service. The plaintiff has indicated that service was done on one of the plaintiff's director. On perusal of minutes of 24/4/2017 filed by the applicant Vijay Chawda is indicated as one of the directors present. This therefore confirm that the person served by the process server is a director of the defendant; but even if he was not a director, the defendant has admitted that the documents were left at the corporations premises documents as provided for by order 5 Rule 3 of the civil procedure. Whether the directors were in or not service was done as required. I therefore find that service of the application was properly served as required by law.

I now wish to consider whether the defendant should be granted opportunity to defend the application dated 6<sup>th</sup> April 2017. Defendant has indicated that it has arguable case and that injunctive orders issued are prejudicial to the defendant. The defendant attached approval of trade mark dated 22<sup>nd</sup> march 2017 from registrar of trade marks. The approval indicate that the application has been received, examined and approved. It stated further that ...it is now proceeding for advertisement in the industrial property Journal. There is no indication that trade mark has been advertised and registered. No document has been attached to confirm that. On the other hand the respondent/plaintiff attached to the 1<sup>st</sup> application a deed of assignment in respect of EXPRESSIONS, X-PRESSIONS, ULTRA X-EXPRESSIONS BRAID & ULTRA X-PRESSIONS executed on 1<sup>st</sup> January 2017. Request to register assignment and receipt for payment are also attached. Certificates of registration trade marks by the initial owner have also been attached.

The question as to whether the suit is defective for failure to comply with order rule 1(4) of the civil procedure rules 2010 which provide that an agent to be recognized in respect of a corporation, such an officer of the corporation must be duly authorized under corporate seal I wish to refer to the case of **Republic vs Kenya ports authority & Another Ex parte makupa transit shade limited Mat International Limited (2014) ECLR** where it was held that:-

***“Where the applicant is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the applicant's bundle of documents which common sense dictate it should. Of course, if the suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with registrar of companies, as a requirement is extended by the defendant, does not invalidate the suit.”***

Further in the case of **Republic vs. Registrar General and 13 others misc. Application No.67 of 2005(2005) ECLR Kimaru J** held that:-

***“...the position in law is that such a resolution by the board of directors of a company may be filed any time before suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.”***

Counsel for the plaintiff herein indicated that the plaintiff has filed authorization of its agent. I agree with the holding in the above case and dismiss the defendant's argument that affidavit in support of the application dated 6<sup>th</sup> April 2017 and verifying affidavit are defective for offending order 4 Rule 1(4).

As to whether the defendant has an arguable case, documents on record the defendant show that defendant failed to establish ownership of trade mark. What defendant attached was approval awaiting advertisement and registration. On the other hand the respondent has filed documents proving that the trade marks were transferred to it. The defendant has not place before court legitimate claim to warrant

setting aside injunctive orders issued. Defendant has failed to establish that it is likely to suffer any prejudice as a result of injunctive orders issued awaiting determination of this suit. I see no merit in the application and do dismiss with costs to the respondent/plaintiff.

Dated and Delivered at Nairobi this **31<sup>ST</sup> day of JULY 2017**

.....

**RACHEL NGETICH**

**JUDGE**

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT/DEFENDANT

.....COUNSEL RESPONDENTS/PLAINTIFF